U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 25 April 2006

CASE NUMBER: 2003-LHC-02540

OWCP NUMBER: 14-138760

In the Matter of :

KAREN McALLISTER (widow of James McAllister),
Claimant,
v.

LOCKHEED SHIPBUILDING, ALBINA ENGINE & MACHINE and WILLAMETTE IRON & STEEL CO. (aka GUY ATKINSON),
Employers,
and

WAUSAU INSURANCE CO., FIREMAN'S FUND INSURANCE CO., and SAIF CORP.,
Insurers.

Appearances

Meagan A. Flynn, Esquire
Preston, Bunnell & Flynn
1500 SW 1st Ave, Suite 770
Portland, Oregon 97201
For the Claimant

Dennis VavRosky, Esquire
VavRosky, MacColl & Olson
One SW Columbia Street
Portland, Oregon 97258
For Albina Engine & Machine and Fireman's Fund Insurance Co.

Russell Metz, Esquire
Metz & Associates
1218 3rd Avenue, Suite 1310
Seattle, Washington 98101
For Lockheed Shipbuilding and Wausau Insurance Co.

Norman Cole, Esquire
Sather Byerly & Holloway
624 SW Morrison, Suite 600
Portland, Oregon 97205
For Willamette Iron & Steel Co. and SAIF Corp.

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (hereinafter referred to as the "Act" or the "Longshore Act"). In brief, Karen McAllister ("the claimant") alleges that her late husband, James McAllister, was exposed to potentially harmful levels of asbestos while working for the defendant shipyards and that this exposure caused the mesothelioma which led to his death on September 22, 2002.

Proceeding before the Office of Administrative Law Judges

A trial on the merits of the claim was held in Portland, Oregon, on February 26, 2004. During the trial, the parties stipulated: (1) that any alleged injuries to Mr. McAllister occurred at a martime situs and while Mr. McAllister was employed in a maritime status, (2) that Mr. McAllister's death was due to mesothelioma, (3) that the mesothelioma was caused by Mr. McAllister's exposure to asbestos, (4) that the claimant, Karen McAllister, is the widow of Mr. McAllister and entitled to survivor's benefits under Section 9 of the Longshore Act if there is a valid claim under the Act, and (5) that if Dr. William J. Brady were called to testify he would testify that any level of exposure to asbestos can potentially cause a person to develop mesothelioma. In addition, the parties submitted evidence establishing that Mr. McAllister worked as a carpenter in shipyards owned by defendants Willamette Iron and Steel ("WISCO") and Albina Engine and Machine Co. ("Albina") during 1956 and 1957 and that Mr. McAllister was employed in a Seattle shipyard now known as Lockheed Shipbuilding and Construction Company ("Lockheed") from the summer of 1957 until approximately 1960.[1]

The principal issue during the trial was the question of which of Mr. McAllister's three shipyard employers is responsible for the payment of benefits under the so-called "last responsible maritime employer" rule. Under that rule, a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for more than one employer. In such multiple employer situations, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first test applies in cases involving disabilities that are caused by occupational diseases and the second test applies in cases involving disabilities that result from multiple or cumulative traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991).

Under the test that applies in occupational disease cases (e.g., cases involving asbestos-related diseases), the responsible employer is the employer that last exposed a worker to potentially injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising from his employment. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director*, OWCP, 914 F.2d 1317 (9th Cir. 1990); *Lustig v. U.S. Department of Labor*, 881 F.2d 593, 596 (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). Under this rule, it is not necessary to show that there was an actual causal relationship between the potentially injurious stimuli and the claimant's impairment, so long as it is at least theoretically possible for the potentially injurious stimuli to have contributed to the impairment. *Port of Portland, supra,* at 840-41.

[1] The evidence also showed that after Mr. McAllister stopped working in the Lockheed shipyard, he worked for a steel company and was later self-employed as the sole proprietor of a roofing business known as Park Place Construction.

In contrast to the test that applies in occupational disease cases, the test that applies in traumatic injury cases bases responsible employer liability on the evidence concerning the actual cause of a worker's ultimate disability. On one hand, if the worker's ultimate disability results from the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury or injuries, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's ultimate disability is at least partially the result of a new traumatic injury that aggravated, accelerated, or combined with a prior injury to create the disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors, supra*, at 624.

Because this case involves an occupational disease, during the trial the parties offered various types of evidence concerning Mr. McAllister's possible exposure to asbestos at all three of the defendant shipyards. This evidence included: (1) testimony from Mr. McAllister's first wife, Margaret Mitchell, indicating that during the entire period when Mr. McAllister worked in the aforementioned shipyards he would leave in the morning wearing clean clothes and return at the end of the day in dusty and dirty clothes; (2) testimony from the claimant indicating that when she and Mr. McAllister discussed employers that might have exposed him to asbestos, he told her that he was exposed to asbestos when he worked "in the shipyards" and specifically mentioned being exposed to asbestos during a job at WISCO that required him to cut "masonite paneling" out of two U.S. Navy destroyers; (3) further testimony from the claimant indicating that Mr. McAllister told her that after working for WISCO he worked for Albina and then in Seattle for two years building destroyers, (4) a letter from Dr. Arthur Zbinden in which he recounted that Mr. McAllister had told him that he had worked around asbestos while employed as a carpenter in shipyards and had given Dr. Zbinden "the impression" that he had been exposed to asbestos throughout his shipyard career; (5) copies of a BRB decision and a Ninth Circuit decision finding that Lockheed was responsible for the asbestos-related diseases of two of its former employees; (6) a transcript of a 1984 deposition in which former asbestos worker Norman Kinsman testified in an unrelated lawsuit about his employment at many different locations in and around Seattle during the 1950s, 1960s and 1970s; (7) a transcript of a 1982 deposition in which George Norgaard, a former superintendent for Owens-Corning Fiberglass, testified that from 1957 to approximately 1971 or 1972 various components of the pipe insulation installed on ships at the Lockheed shipyard contained asbestos and that members of "almost all crafts" would have been in the vicinity on those occasions when the pipe insulation was being installed.

The post-trial briefs of all the parties except Lockheed contended that Lockheed is the last responsible maritime employer and therefore obligated to provide survivors benefits to the claimant. In making the argument that Lockheed is responsible for the payment of benefits, the non-Lockheed parties all contended that there is sufficient evidence to warrant an inference that Lockheed was the last maritime employer to have exposed Mr. McAllister to asbestos. In contrast, Lockheed argued that the evidence purporting to show that it had exposed Mr. McAllister to asbestos is not probative enough to satisfy even the requirements for invoking the Act's subsection 20(a) presumption. Pursuant to long-standing interpretations of subsection 20(a), a Longshore Act claimant is presumed to be entitled to compensation under the Act if the claimant produces evidence indicating: (1) that he or she suffered some harm or pain, and (2) that working conditions existed or an accident occurred that could have caused the harm or pain.

See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Once these two requirements have been satisfied, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp*., 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp*., 29 BRBS 18, 21 (1995).

In a Decision and Order Awarding Benefits issued in this case on July 23, 2004, it was concluded that the record does in fact contain enough evidence to warrant a subsection 20(a) presumption that Mr. McAllister's death was causally related to his employment by Lockheed. Therefore, because Lockheed was indisputably Mr. McAllister's last maritime employer and had offered no evidence to rebut the subsection 20(a) presumption, Lockheed was found to be the last responsible maritime employer and ordered to pay survivors benefits to the claimant pursuant to the provisions of section 9 of the Longshore Act.

Those portions of the Decision and Order Awarding Benefits that pertained to the subsection 20(a) presumption specifically noted that the evidence concerning that issue would be evaluated under the standard set forth in the decision of the United States Court of Appeals for the District of Columbia in *Brown v. I.T.T./Continental Baking Co*., 921 F.2d 289 (D.C. Cir. 1990). In that decision, the court held that a claimant is entitled to invoke the subsection 20(a) presumption if he or she adduces only "*some* evidence tending to establish" each of the two prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. 921 F.2d at 296, n.6 (emphasis in original). In applying this standard to the evidence in this case, it was determined that most of the evidence offered to prove that Mr. McAllister was exposed to asbestos while employed by Lockheed was too weak by itself to meet the "some evidence" standard set forth in the *I.T.T. Continental Baking* decision, but that the transcript of Mr. Norgaard's testimony concerning the use of asbestos products at the Lockheed shipyard during the approximately two-year period of Mr. McAllister's employment at that shipyard was sufficient to meet that standard.

Decision and Order of the Benefits Review Board

In a Decision and Order issued on August 19, 2005, the Benefits Review Board ("BRB") vacated the Decision and Order Awarding Benefits and remanded the matter for further consideration consistent with its opinion. In its decision, the BRB held that in cases involving last responsible employer issues, it is improper to invoke the subsection 20(a) presumption against any particular employer, as it had been invoked against Lockheed in this case. Rather, the BRB indicated:

> The causation determination is made without reference to a particular covered employer. That is, the Section 20(a) presumption is not invoked *against a particular employer*; instead, the evidence of record must be considered to determine if the evidence is sufficient to invoke the Section 20(a) presumption *on*

> *behalf of a claimant*. *Zeringue v. McDermott, Inc*., 32 BRBS 275 (1998)[footnote omitted]; *Lins v. Ingalls Shipbuilding, Inc*., 26 BRBS 62 (1992). In this case, claimant must establish that decedent was exposed to asbestos **during the period of his shipyard employment as a whole** in order to invoke the Section 20(a) presumption that his condition was related to that employment.

BRB Decision and Order at 4 (italic emphasis in original, boldface emphasis added). Further, the BRB explained, "[i]f any of the employers rebuts the presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion." BRB Decision and Order at 4-5.

In addition, the BRB held that if a claimant successfully shows a causal relationship, "then the employers in the case must establish which of them is liable for benefits." BRB Decision and Order at 5. In particular, the BRB explained:

> Claimant does not bear the burden of proving the responsible employer; rather **each** employer bears the burden of establishing that it is not the responsible employer. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Susoeff v. San Francisco Stevedoring C*o., 19 BRBS 149 (1986); [footnote omitted] *see also Cooper/T Smith Stevedoring Co., Inc. v. Liuzza,* 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002)*; Ramey,* 134 F.3d 954*,* 31 BRBS 206(CRT)*; Avondale Industries, Inc. v. Director, OWCP (Cuevas),* 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992)*.*

BRB Decision and Order at 5 (emphasis added). According to the decision, an individual employer can make a showing that it is not a responsible employer if it demonstrates "either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer." BRB Decision and Order at 5.

After setting forth the standards governing the application of subsection 20(a) in multiple employer cases, the BRB Decision and Order went on to hold that it was proper to admit the Norgaard deposition into evidence and to rely upon that deposition in determining whether the subsection 20(a) presumption had been invoked. However, it also held that Mr. Norgaard's deposition testimony was not, by itself, sufficient to satisfy the claimant's subsection 20(a) burden of producing evidence that Mr. McAllister had been exposed to asbestos while working for Lockheed. BRB Decision and Order at 7-8. In explaining this conclusion, the BRB decision observed that the mere fact that the Norgaard deposition shows that asbestos was present at the Lockheed shipyard at the time of Mr. McAllister's employment is not sufficient to establish that Mr. McAllister was exposed to asbestos during his employment at that shipyard. BRB Decision and Order at 8. During the course of discussing this issue, the BRB decision asserted that the claimant's burden in seeking to invoke the subsection 20(a) presumption in this case includes the burden of providing "substantial evidence" to show that Mr. McAllister was exposed to asbestos. BRB Decision and Order at 7. Three prior decisions were cited as support for this contention: *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs*, 455 U.S. 608 (1982); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23

BRBS 316 (1989); and *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). The BRB's decision did not acknowledge or discuss the statement by the United States Court of Appeals for the District of Columbia indicating that Longshore Act claimants need present only "some evidence" in order to invoke the subsection 20(a) presumption.[2]

However, the BRB decision then went on to agree with the claimant, Albina and WISCO that there could be enough evidence to invoke the subsection 20(a) presumption if Mr. Norgaard's deposition testimony were to be considered in conjunction with Dr. Zbinden's letter and the testimony of the claimant and Mrs. Mitchell. BRB Decision and Order at 8-9. Moreover, the BRB also provided guidance concerning the application of subsection 23(a) of the Act, which allows declarations of deceased workers concerning an injury to be received into evidence. In particular, the Board announced that it has decided that its prior decision in *Martin v. Kaiser Co*, 24 BRBS 112 (1990), erroneously limited the definition of the term "injury" to "physical harm" and that the proper definition of the term also includes both the "working conditions" element and the "harm" element of a *prima facie* case. BRB Decision and Order at 11-12. The decision also noted that such decedent declarations do not have to be corroborated to be admissible into evidence, but that if they are corroborated such declarations can be conclusive evidence of an injury. BRB Decision and Order at 11. Hence, the BRB added, in this case, an administrative law judge "could credit decedent's declarations and invoke the Section 20(a) presumption" if those declarations are found to be probative and credible. BRB Decision and Order at 12.

Finally, the BRB explained that if it were determined on remand that the claimant has established a *prima facie* case and that there is no evidence to rebut the resulting presumption that Mr. McAllister's death was work related, the burden of proof would then shift to each of the defendant employers to show either that Mr. McAllister was not exposed to injurious stimuli at their facilities in sufficient quantities to have caused his disease or that he had such exposure while working for a subsequent maritime employer. BRB Decision and Order at 13. The decision further noted that since Lockheed was Mr. McAllister's last maritime employer, if the subsection 20(a) presumption were properly invoked, Lockheed would have the burden of "proving it did not expose decedent to injurious stimuli, in order to escape liability as the responsible employer."

In the section of the BRB's decision that enunciates of the foregoing principles for applying subsection 20(a) in multiple employer cases, the BRB commented that the administrative law judge's decision and the appellate briefs of all four of the parties in this

---

[2] Moreover, review of the three precedents the BRB cited for a "substantial evidence" requirement indicates that none of those decisions actually holds or even implies that a claimant is required to present "substantial evidence" in order to successfully invoke the subsection 20(a) presumption. It should also be noted that highest courts in at least three jurisdictions where workers' compensation statutes contain provisions essentially identical to subsection 20(a) (New York, Alaska, and the District of Columbia) have all held that only "some evidence" is needed in order to invoke the presumption. *See Lorchitsky v. Gotham Folding Box Co*., 230 N.Y. 8, 128 N.E. 899 (N. Y. 1920); *Gillispie v. B & B Foodland*, 881 P.2d 1106 (Alaska 1994); *Ferreira v. District of Columbia Dep't of Employment Services*, 531 A.2d 651 (D.C. 1987).

proceeding "erroneously conflate the issues of responsible employer and causation." BRB Decision and Order at 4. A nearly identical statement is also contained in the BRB's decision in a similar case involving at least seven appellate briefs. *See Schuchardt v. Dellingham Ship Repair, et al*, ____ BRBS ____ (2005). Although the BRB is entitled to express its disappointment with the alleged confusion, it should also be pointed out that the standards set forth in the BRB's decision in this proceeding and in the *Schuchardt* case deviate substantially from past precedents concerning the application of subsection 20(a) to disputes concerning the identification of last responsible employers in an occupational disease cases. There are two reasons for this observation.

First, although the BRB's decision asserts that the subsection 20(a) presumption cannot be invoked "*against a particular employer,"* that assertion is not supported by either of the two precedents cited by the BRB: *Zeringue v. McDermott, Inc*., 32 BRBS 275 (1998), and *Lins v. Ingalls Shipbuilding, Inc*., 26 BRBS 62 (1992). Although both of these decisions concern the application of the subsection 20(a) presumption, neither the *Zeringue* decision[3] nor the *Lins* decision[4] holds or even implies that subsection 20(a) cannot be invoked against a particular employer.

---

[3] In the *Zeringue* decision, an administrative law judge invoked the subsection 20(a) presumption based on a claimant's testimony that he had been exposed to loud noise while employed by McDermott, Inc., and the administrative law judge then found that McDermott was required to compensate the claimant for a 45.3 percent binaural hearing loss. On appeal, McDermott, which was the claimant's last employer, contended, *inter alia*, that the claimant's hearing loss existed when he worked for a prior employer. The BRB held that this contention was irrelevant because under the last responsible employer rule set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955), in occupational disease cases the employer responsible for the payment of benefits is simply the last maritime employer to expose an employee to injurious stimuli prior to the date the employee becomes aware that he is suffering from an occupational disease---a standard that intentionally does not require proof that the exposure to the injurious stimuli actually caused or worsened the occupational disease. The decision does not hold or even imply that the subsection 20(a) presumption cannot be invoked against a particular employer or that it can be invoked only on behalf of a claimant.

[4] In the *Lins* case, the administrative law judge invoked the subsection 20(a) presumption based on defendant Ingalls Shipbuilding's admission that it had exposed the claimant to noise that could have caused a hearing loss. The Administrative Law Judge also found that Ingalls had failed to prove that the claimant had been exposed to potentially injurious noise levels at a subsequent employer and therefore found Ingalls responsible for the claimant's hearing loss. On appeal, Ingalls contended that it should have been allowed to invoke the subsection 20(a) presumption against the subsequent employer and the BRB rejected that contention by concluding that the subsection 20(a) presumption "is a presumption of compensability which has no bearing on the responsible employer issue." Although this holding does support the BRB's conclusion that the presumption can only be invoked "on behalf of a claimant," it does not in any way indicate that the presumption is "not invoked against a particular employer." Rather, in that case, it appears that the presumption was in fact invoked against Ingalls, but not against the subsequent employer.

Second, the BRB's assertion that **each** defendant "employer bears the burden of establishing it is not the responsible employer" once "causation is found" (i.e., a claimant has invoked a subsection 20(a) presumption "without reference to a particular covered employer" and the presumption has not been rebutted) is not supported by any of the five precedents the BRB cites for that conclusion. The first decision cited by the BRB, *General Ship Services v. Director, OWCP*, 938 F.2d 960 (9th Cir. 1991), agrees with the BRB's holding in *Susoeff v. San Francisco Stevedoring*, 19 BRBS 149 (1986), that a maritime employer seeking to escape liability for an employee's occupational disease may do so by demonstrating that a subsequent maritime employer exposed the employee to potentially injurious stimuli. However, the *General Ship* decision does not in any way suggest that some sort of burden of proof can be imposed on an employer in the absence of at least some evidence that the employer exposed a claimant to potentially harmful stimuli. Rather, the authors of the *General Ship* decision seem to have gone out of their way to indicate that the court was imposing a burden only on those employers who had first been shown to have "exposed an employee to injurious stimuli." *See* 938 F.2d at 961-62 (passages in the decision noting: (1) that an administrative law judge had determined that *both* the employers in that case had exposed the decedent to asbestos, (2) that the BRB's *Susoeff* decision holds that "an *employer who has exposed an employee to injurious stimuli* can escape liability by demonstrating that the employee was also exposed to injurious stimuli" while working for a subsequent maritime employer, and (3) that "[p]lacing the burden of proof on employer *who has exposed the claimant to harm* ensures that the claimant will recover for his injuries.")(emphasis added).

Likewise, the *Susoeff* decision, which is second precedent cited by the BRB, also fails to contain any language that would support a conclusion that some sort of burden of producing evidence can be placed on employers that have not in some way been specifically connected to a worker's exposure to harmful substances. Although the *Susoeff* decision does hold that a claimant who has successfully shown that a maritime employer has exposed him or her to harmful stimuli has met his or her burden of proof and does not have the additional burden of proving that "no other employer" is liable, the decision does not in any way hold or suggest that each of the claimant's subsequent employers has a burden of showing that it is not the responsible employer. Indeed, as the court in the *General Ship* decision points out, the *Susoeff* decision imposes such a burden only on subsequent employers that have "exposed an employee to injurious stimuli." Similarly, none of the other three decisions cited in the BRB's decision holds otherwise. Instead, each of those decisions merely restates the well-settled principle that if an injured worker can show that he or she was exposed to harmful stimuli by an employer, that employer then has the burden of showing that the stimuli did not cause the harm or that the worker was also exposed to the injurious stimuli by a subsequent maritime employer. None of these decisions in any way holds, as does the BRB on page 5 of its decision in this case, that if an injured worker shows exposure to injurious stimuli by any maritime employer, then "each" of the other defendant employers in a case has the burden of showing that it did not expose the worker to injurious stimuli. *See Cooper/T Smith Stevedoring Co., Inc. v. Liuzza,* 293 F.3d 741 (5th Cir. 2002)*; Ramey,* 134 F.3d 954 (9th Cir. 1998)*; Avondale Industries, Inc. v. Director, OWCP (Cuevas),* 977 F.2d 186 (5th Cir. 1992).

Finally, it should also be noted that an expansion of the scope of the subsection 20(a) presumption to include potentially all of an injured worker's former maritime employers, even if

the evidence used to invoke the presumption pertains to only one of the employers for whom the claimant worked "during the period of his [or her] shipyard employment as a whole," apparently conflicts with the principle that "the circumstances giving rise to [a] presumption must make it more likely than not that the presumed fact exists."[5] *See National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910-12 (D.C. Cir. 1999) (holding that an Interior Department regulation establishing a rebuttable presumption that owners of underground mines would be responsible for earth-movement damage to commercial buildings or residential dwellings if such structures were located within a 30-degree "angle of the draw" of an underground mine was impermissible because the Interior Department failed to show that the circumstances giving rise to the presumption "make it more likely than not that the presumed fact exists," thereby indicating that there was no "sound and rational connection between the proved and inferred facts"). The requirement that there be a "rational connection" between causation and the imposition of

[5] In this regard it should be noted that if the subsection 20(a) presumption cannot be applied against every defendant employer on the basis of evidence pertaining to only one employer, there would be no other lawful basis for holding that each employer has the burden of showing that it did not expose the claimant to injurious stimuli or that some subsequent employer exposed the claimant to such stimuli. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (holding that the burden of persuasion in administrative proceedings under the Longshore Act rests on claimants). Moreover, it is clear that last responsible employer liability cannot be imposed on any employer unless there is some sort of lawful presumption or evidence that the employer has in fact exposed the injured worker to harmful stimuli. This conclusion is illustrated by the language of the leading appellate court decisions enunciating the last responsible employer rule. For example, in the seminal case of *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1954), the court stated the rule in the following language:

> … *the employer during the last employment in which claimant was exposed to injurious stimuli*, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

225 F.2d at 145 (emphasis added). Likewise, in the Ninth Circuit's decision in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), the court held that liability should be assigned to the employer "covering the risk at the time of the most recent injury *that bears a casual [sic] relation to the disability*." 580 F.2d at 1336 (emphasis added). The Fifth Circuit also expressed such an understanding of the rule when it held:

> Congress intended that *the employer during the last employment in which the claimant was exposed to injurious stimuli*, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment, should be liable for the full amount of the award.

Avondale Industries, Inc. v. Director, OWCP, 977 F.2d 186, 190 (5th Cir. 1992). Indeed, in the same decision, the court even referred to this principle as "the last *causative* employer rule." *Id.*

liability has also been recognized by the Ninth Circuit in its application of the last responsible employer rule. The most relevant of these Ninth Circuit decisions is *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). In *Cordero*, the court found that liability had properly been assigned to Triple A Machine Shop only because "there [was] a rational connection between the length of employment proven and the contribution to the development and aggravation of the disease."[6]

Significantly, it is highly questionable whether the BRB's recently articulated application of the subsection 20(a) presumption satisfies the requirement that there be a rational connection between the facts needed to invoke a presumption and the facts purportedly established by the presumption. Indeed, it would seems to be less than rational to presume that all of an injured shipyard or longshore worker's employers have exposed the worker to potentially injurious stimuli based solely on evidence indicating that only one other employer had exposed the worker to such stimuli. The seeming lack of a rational connection is even more apparent when it is recognized that by the time most former shipyard workers become aware of the fact that they have acquired an asbestos-related disease, they have worked for many years and at many different shipyards. Likewise, longshore workers (who are also covered by the last employer rule) often change employers every few days and in the course of a single year might work for every single stevedoring company in a particular port. Moreover, many longshore workers perform many different types of jobs in a variety of different work environments. For these reasons, it seems doubtful that the evidence showing that one employer has exposed a worker to harmful stimuli would "make it more likely than not" all of the worker's other maritime employers have also exposed the worker to the same harmful stimuli. Indeed, any such inference would seem to be somewhat farfetched.

Contentions Concerning the Remanded Issues

After the record in this case was remanded to the Office of Administrative Law Judges, all parties were given the opportunity to file briefs addressing the issues remanded by the BRB.

---

[6] Similarly, in *Port of Portland v. Director, OWCP (Ronne)*, 932 F.2d 836 (9th Cir. 1991), the court held that the BRB had erred in assigning last responsible employer liability to an employer that could not have even theoretically contributed to a claimant's work-related hearing loss. The court explained its decision as follows:

> We agree with the Board that *Cordero* does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease. But *Cordero* does require that that liability rest on the employer covering the risk at the time of the most recent injurious exposure *related* to the disability….
>
> We reject any reading of *Cardill*o that would impose liability on an employer who *could not,* even theoretically, have contributed to the causation of the disability. Our emphasis on rational connection and causal relation in *Cordero* militates against such a reading.

932 F.2d at 840-41 (emphasis original).

As before, the claimant, Albina, and WISCO all contended that the subsection 20(a) presumption has been properly invoked, that the presumption has not been rebutted, and that Lockheed is the responsible employer. In contrast, Lockheed contended that if the subsection 20(a) presumption has been invoked, it is because of the evidence that Mr. McAllister was exposed to asbestos while working for Albina and WISCO, rather than because of any evidence of such exposure while he worked for Lockheed. Lockheed further contended that it is not the responsible employer because it is "more likely than not" that Albina or WISCO last exposed Mr. McAllister to asbestos. However, Lockheed did concede that none of the employers has rebutted the subsection 20(a) presumption.

Because all the parties concede that the subsection 20(a) presumption has not been rebutted, there are only two issues that need to be resolved: (1) whether the subsection 20(a) presumption has been successfully invoked, and (2) which employer is the last responsible maritime employer.

ANALYSIS

As previously explained, the BRB's Decision and Order holds that a maritime worker who has an asbestos-related disease does not have to invoke the subsection 20(a) presumption against any particular employer but is, in effect, entitled to the benefit of a presumption against all of the defendant employers in a multiple employer case if it can be shown that the claimant was exposed to asbestos "during the period of his shipyard employment as a whole." BRB Decision and Order at 4. Moreover, the Board held, if the presumption has been properly invoked and not successfully rebutted by at least one of the defendant employers, "each employer bears the burden of establishing it is not the responsible employer" by demonstrating "either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer." BRB Decision and Order at 5.

In this case, there is clear, credible, and unrebutted evidence that Mr. McAllister told the claimant that he was exposed to asbestos while employed by WISCO. Indeed, all the defendants, including WISCO, concede that such exposure did occur. Such evidence by itself surely constitutes the kind of "substantial evidence" that the BRB's Decision and Order says is necessary to successfully invoke the subsection 20(a) presumption against all of the defendant employers.[7] In addition, all parties, including Lockheed, agree that none of the defendants has

[7] For this reason, under the principles set forth in the BRB's Decision and Order, it would be superfluous to also consider whether the evidence concerning Mr. McAllister's possible exposure to asbestos while working for Lockheed is sufficient to invoke the presumption. However, if it were necessary to determine whether there is sufficient evidence to warrant a subsection 20(a) presumption that Mr. McAllister was also exposed to asbestos while working for Lockheed, it would be concluded that there is sufficient evidence is to justify such a presumption under both the "substantial evidence" and "some evidence" standards. This conclusion is supported by evidence showing that during a period of approximately two years Mr. McAllister worked as a carpenter during the construction of two destroyers at the Lockheed shipyard (testimony of the claimant and pay records) and that during this period almost all craft

rebutted the presumption and there is no evidence in the record disputing Dr. Brady's stipulated opinion that exposure to any level of asbestos can potentially cause mesothelioma. Hence, under the legal analysis set forth in the BRB's Decision and Order, all of the defendant employers are responsible employers. Moreover, because Lockheed was the last of these employers, Lockheed is therefore the "last responsible employer" and obligated to pay Longshore Act survivors benefits to the claimant.

It is recognized that Lockheed has argued that it should be relieved of liability because it is allegedly "more likely than not" that Albina or WISCO last exposed Mr. McAllister to asbestos. Although Lockheed's proposed "more likely than not" test may be the test that applies in multiple employer cases where a claimant has suffered two or more traumatic injuries, it is clearly not the test that applies in cases in which claimants have acquired occupational diseases.[8] Moreover, there is nothing in the BRB's Decision and Order in this case suggesting that such a standard should be used when determining the last responsible employer in this or any other occupational disease case. Indeed, on the last page of its decision in this case the BRB clearly stated that if the subsection 20(a) presumption is successfully invoked, Lockheed "would bear the burden of proving it did not expose decedent to injurious stimuli, in order to escape liability as the responsible employer." BRB Decision and Order at 13. In short, under the standards for applying subsection 20(a) that are set forth in the BRB's decision in this case, Lockheed is clearly the employer that has the obligation to pay benefits to the claimant.

ORDER

1. Beginning on September 22, 2002, and for so long as the claimant remains unmarried, Lockheed Shipbuilding and Wausau Insurance Company shall pay the claimant, Karen McAllister, widow's benefits in the amount of $644.34 per week plus such annual adjustments as are required by the provisions of subsection 10(f) of the Longshore Act. If the claimant re-marries, such payments will terminate after two years.

---

workers (e.g., carpenters) would be in the vicinity of asbestos as it was being installed as pipe installation (deposition of Mr. Norgaard). This conclusion is corroborated by Ms. Mitchell's testimony that Mr. McAllister would routinely come home covered with dust when he worked in the shipyards and by the evidence provided by the claimant and Dr. Zbinden suggesting the Mr. McAllister believed that he had been exposed to asbestos in all three of the defendant shipyards.

[8] The "more likely than not" test for identifying responsible employers in traumatic injury cases was in effect set forth by the BRB in its decision in *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999). It is appropriate to have a different test for identifying responsible employers in cases involving two or more traumatic injuries because, as previously explained, in such cases the responsible employer is the last employer that made an actual causal contribution to a worker's disability. In contrast, in occupational disease cases it is unnecessary to show that there was an actual causal relationship between the potentially injurious stimuli and the claimant's impairment, so long as it is at least theoretically possible for the potentially injurious stimuli to have contributed to the impairment.

2. Lockheed Shipbuilding and Wausau Insurance Company shall pay interest on each unpaid installment of compensation from the date such compensation became due at the rates to be determined by the District Director.

3. Lockheed Shipbuilding and Wausau Insurance Company shall be entitled to a credit for all amounts previously paid to the claimant pursuant to the Decision and Order Awarding Benefits dated July 23, 2004.

4. The District Director shall make all calculations necessary to carry out this order.

5. Counsel for the claimant shall within 20 days of service of this order submit a fully supported application for costs and fees to the counsel for Lockheed Shipbuilding and Wausau Insurance Company. Within 15 days thereafter, the counsel for Lockheed Shipbuilding and Wausau Insurance Company shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for Lockheed Shipbuilding and Wausau Insurance Company. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for Lockheed Shipbuilding and Wausau Insurance Company. The counsel for Lockheed Shipbuilding and Wausau Insurance Company shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by the undersigned administrative law judge.

A

Paul A. Mapes
Administrative Law Judges